

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM WILKINSON

Claimant

VS.

PITTSBURG STATE UNIVERSITY

Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,053,489

ORDER

Claimant and Respondent requested review of the May 31, 2013, Award by Administrative Law Judge (ALJ) Brad E. Avery. At the request of the parties, the Board placed this matter on its summary docket on September 10, 2013.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh, of Pittsburg, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the Board considered the June 21 and December 19, 2012, depositions of Karen Terrill. Neither were listed in the Award. However, both appear to have been considered by the ALJ as Ms. Terrill's opinions were referenced by the ALJ in the Award. The yearly Social Security retirement benefit paid to claimant is listed by the ALJ on page two of the Award, pursuant to the April 1, 2013, stipulation letter from the parties. The calculations by the ALJ and the reasoning behind those calculations are adopted by the Board for the purposes of this Order.

ISSUES

The ALJ found it is more likely than not that claimant suffered a neck injury either as a result of his accidental injury and/or the physical therapy he was provided to treat his shoulder. The ALJ found claimant to have a 12.33 percent whole body functional impairment, and found claimant to be permanently and totally disabled.

Claimant appeals, arguing the offset of K.S.A. 44-501(h) the ALJ applied to the Award is inappropriate, as the work-related injury caused claimant, a retired worker, to suffer a second wage loss. Claimant contends that he intended to work for the rest of his life drawing income from his employment and from Social Security, but he sustained a work injury that progressed to the point he could not physically perform his job anymore and he had to leave his employment, thus suffering a wage loss. Claimant would like the permanent total disability award affirmed, but the offset reversed.

Respondent also appeals, arguing the Award should be reversed and claimant awarded no more than a scheduled injury to the shoulder, as claimant has failed to sustain his burden of proof of a neck injury being caused or aggravated by his work. Respondent argues the Social Security offset is proper.

The issues on appeal are:

1. Did the ALJ err in applying an offset to the Award for Social Security retirement?
2. What is the nature and extent of claimant's injury and disability, and more particularly, did the claimant sustain his burden of proof in establishing that he is permanently and totally disabled as the result of his work-related accident?

FINDINGS OF FACT

Claimant worked for respondent for over 18 years as an equipment operator. On November 14, 2008, claimant was loading limbs with a Bobcat when as he was exiting the machine, slipped and fell on a muddy tire, catching all of his weight with his right arm. Claimant weighed 220 pounds at the time. Claimant testified that he felt pain in his shoulder, arm and neck. Claimant was sent to Dr. Donald Holsinger, the company doctor, who ordered x-rays and prescribed medication. Claimant was also referred to Dr. Yahya Bakdalieh, a physiatrist, who ordered physical therapy and then to Michael Zafuta, M.D., a board certified orthopedic surgeon.

Claimant first saw Dr. Zafuta on January 5, 2009. At that time, claimant was diagnosed with a right shoulder rotator cuff tear with biceps hypertrophy and subluxation with acromioclavicular arthrosis. Dr. Zafuta operated on claimant's right shoulder on January 27, 2009, performing a right shoulder arthroscopic acromioplasty, distal clavicle excision, biceps tenotomy and open rotator cuff repair. Claimant reported improvement on February 10, 2009, with ongoing physical therapy and the continued use of a sling prescribed.

A March 9, 2009, office note indicates continued improvement, with claimant noting only minimal pain in the right shoulder. Physical therapy continued and claimant reported no new injuries. Claimant was returned to work restricted to his left arm only. Claimant reported continued improvement at the April 6 and May 11, 2009, examinations. Claimant

remained restricted to one arm work only. However on June 8, 2009, claimant complained of decreased motion in the shoulder. The office note reported no neck pain or paresthesias. The note also restricted claimant from working, with no lifting with the right arm. By July 6, 2009, claimant was returned to work with no overhead activities. Claimant continued with physical therapy to increase his upper extremity strength. By September 10, 2009, claimant was allowed right upper extremity lifting below shoulder level and less than 5 pounds. Claimant's monthly progress continued, although he reported weakness and ongoing pain in the shoulder.

Claimant reached maximum medical improvement on February 11, 2010, with recommended restrictions of no lifting above shoulder level on the right and no lifting greater than 10 pounds with the right arm. Dr. Zafuta's June 25, 2010, report rated claimant at 15 percent to the right shoulder based upon the AMA Guides, 4th ed. Dr. Zafuta was adamant on both direct and cross-examination that claimant failed to complain about his neck during the periods of treatment provided by Dr. Zafuta. Claimant also failed to register any complaints associated with his lengthy physical therapy treatment.

Claimant testified he has had pain in his neck, arm and shoulder every day since the accident on November 14, 2008. Claimant testified his initial treatment was focused on his shoulder. However, his neck condition got worse while he was working with weights during physical therapy. Claimant reported lifting the weights made his neck worse, but the therapist continued to increase the weight.

Claimant testified that there was a time when he returned to work that he was having neck and shoulder pain which he reported to respondent. Claimant stopped working for respondent on March 4, 2011, because of the neck and shoulder pain. Claimant testified that he had a lump on the right side of his neck that had been present since the accident and after physical therapy. This left him unable to lay on his right side or reach behind his neck. Claimant also testified to having weakness in his shoulder and numbness in his hand. Claimant takes ibuprofen three times a day. He has not worked since March 4, 2011. The medical records of Dr. Zafuta fail to mention a lump on claimant's neck.

Claimant had been seeing Dr. Ellis, a chiropractor, regarding his neck and back prior to the November 2008 accident. However, he was pain free on the day of the accident. Claimant acknowledged that he never asked respondent to provide medical treatment for his neck. Claimant denies any back problems prior to the accident.

While claimant was working for respondent he was receiving Social Security retirement benefits. Claimant began receiving those benefits when he turned 65, prior to the date of accident in this matter. Claimant intended to draw those benefits for the rest of his life.

At the request of his attorney, claimant met with board certified orthopedic surgeon Edward J. Prostic, M.D., on March 14, 2011, for an evaluation. Claimant had complaints of pain in the right shoulder going to the right side of his neck. He complained of difficulty lying on his right side, difficulty reaching above shoulder level and behind his back, weakness with difficulty predominately reaching and lifting, numbness and tingling down the right arm to all fingers and weakness of grip.

Dr. Prostic testified claimant sustained injuries on or about November 14, 2008, during the course of his employment which required reimplantation of the rotator cuff and aggravated preexisting degenerative disc disease of the cervical spine. An MRI was recommended to check the continuity of the repair and to look at the biceps, should claimant's shoulder symptoms be unacceptable. In the meantime, claimant was instructed to continue with his anti-inflammatory medication and stretching and strengthening exercises.

Dr. Prostic again met with claimant on March 2, 2012. Claimant continued to have pain and a lump at the right side of his neck with right shoulder pain in the deltoid area. Claimant reported difficulty reaching behind his neck and back, continued weakness in his shoulder, intermittent numbness in his hand and he occasionally drops objects.

Dr. Prostic continued to opine claimant sustained injuries on or about November 14, 2008, during the course of his employment. He found claimant had a recurrent rotator cuff tear, physical evidence of thoracic outlet syndrome, and symptoms highly suggestive of carpal tunnel syndrome and of having had cervical radiculopathy. Dr. Prostic felt claimant may benefit from a repeat repair of his rotator cuff and treatment for his nerve irritability. He also opined that, after reviewing claimant's prior records, claimant has degenerative disc disease in the neck which is the cause of claimant's neck pain. He indicated claimant told him the neck pain started after he was in physical therapy post shoulder surgery. Dr. Prostic acknowledged claimant's cervical radiculopathy was an ambiguous diagnosis as claimant had symptoms consistent with it, but no physical tests or EMG findings to prove it.

Dr. Prostic assigned claimant a 10 percent permanent partial impairment to the body as a whole for the cervical spine and a 20 percent functional impairment to the right upper extremity at the level of the shoulder, for a combined impairment of 21 percent to the body as a whole on a functional basis. He also felt claimant needed to continue under Dr. Zafuta's restrictions of no lifting above shoulder level or more than 10 pounds to shoulder level, and to avoid awkward positions of the cervical spine.

Dr. Prostic went on to opine claimant is permanently and totally disabled from performing substantial gainful employment, and has a 96 percent task loss, having lost the ability to perform 25 out of 26 tasks.

Claimant met with Pat Do, M.D., on August 1, 2011, for a court-ordered IME. Claimant had complaints of right shoulder and neck pain. Dr. Do examined claimant and found tenderness of the right side of the neck and right shoulder, weakness to the rotator cuff and decreased motion in the shoulder. He diagnosed status post right shoulder rotator cuff repair with some continued symptomatology, and myofascial neck pain. Dr. Do suggested claimant get an MRI of the right shoulder and if the scan proved normal, claimant would be at maximum medical improvement. Dr. Do was concerned that claimant's rotator cuff had not completely healed as he has been having pain for over a year after surgery. Although Dr. Do believes claimant's shoulder injury is related to the November 2008 accident, he does not believe the neck is related. He opined that typically neck pain is in response to a shoulder rotator cuff injury, which is not a ratable condition, but in this case he felt that the neck was a separate injury. Dr. Do found no objective findings of a separate neck impairment.

A repeat MRI was performed on September 1, 2011. The MRI identified a chronic full thickness re-tear of the supraspinatus tendon.¹ A repeat surgery was discussed to repair the tear. Claimant declined another surgery and Dr. Do was fine with that. The doctor acknowledged the changes in claimant's neck would be expected in a 68 year old man.

Dr. Do went on to opine that if claimant were at maximum medical improvement he would assign a 7 percent whole person functional impairment (5 percent to the neck and 3 percent for the shoulder). He recommended restrictions of no overhead use 33 to 66 percent of the day with the right shoulder; no lifting greater than 10 pounds above the shoulder on the right, lifting from floor to waist of 40-50 pounds and lifting from waist to shoulder up to 50 pounds.

Claimant met with Karen Terrill via telephone for a vocational assessment on February 6, 2012. Ms. Terrill found that claimant had no transferrable job skills. Claimant was not working at the time of the interview so he had a 100 percent wage loss.

Ms. Terrill had a followup interview with claimant on March 6, 2012, and reviewed the restrictions of Dr. Prostic and Dr. Zafuta and provided an updated opinion. Claimant continued to be unemployable, and therefore was left with a wage loss of 100 percent.

Ms. Terrill testified claimant is permanent and totally disabled from performing substantial gainful employment as a result of his work injury at respondent on November 14, 2008.

¹ Do Depo., Ex. 2 at 1.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

Claimant alleges an accident on November 14, 2008, with resulting injuries to his right arm, right shoulder and neck. The initial medical records identify the arm and shoulder complaints, but fail to mention any neck complaints. This is true throughout the entire period of treatment claimant received with Dr. Zafuta. There is no mention of neck pain and no request for medical treatment for claimant's neck. Claimant's treatment regimen with Dr. Zafuta details a slow but steady progression of improvement with the shoulder. Claimant alleges his lengthy period of physical therapy caused or contributed to the shoulder and neck complaints. However, the evidence contains no such records, nor any testimony supporting claimant's claims of injury and aggravation. Dr. Zafuta's records regularly mention the ongoing physical therapy with no indication of any problems.

The K-WC E-1 Application for Hearing filed with the Division on November 19, 2010, lists November 14, 2008, as the date of accident. There is no allegation of a series of traumatic accidents or a different accident date. Claimant was released at maximum medical improvement by Dr. Zafuta on February 11, 2010. He provided a permanent functional impairment rating on June 25, 2010. Again, there is no mention of neck involvement.

Claimant last worked for respondent on March 4, 2011. When he saw Dr. Prostic on March 14, 2011, he complained of shoulder and neck pain, which Dr. Prostic related back to the 2008 accident. This was, in part, based upon claimant's allegation that he suffered neck pain from day one after the accident. When Dr. Prostic examined claimant again on March 2, 2012, he noted the ongoing pain in the shoulder and neck. He also documented a lump at the right side of claimant's neck, a finding not mentioned in the earlier medical report from the first examination.

When claimant was examined by Dr. Do, a second MRI was performed which displayed a full thickness re-tear of the supraspinatus tendon. Additionally, claimant testified that his condition was bad enough that he was forced to leave his job with

² K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

respondent, retiring due to the pain. Dr. Do determined the neck injury was not related to claimant's November 14, 2008, work accident.

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.⁴

The initial accident arose out of and in the course of claimant's employment with respondent and every natural consequence from that injury is compensable, but only if it is a direct and natural result of the primary injury. Here claimant suffered an immediate injury to his shoulder, but not to the neck. This determination is based on the months of treatment and medical records of Dr. Zafuta. Claimant's allegations of immediate neck pain are not supported by this record. Claimant suffered a work-related injury to his right shoulder, but not his neck.

Additionally, the treatment provided by Dr. Zafuta appeared to have resolved, or at least stabilized claimant's right shoulder. However, by the time claimant came under the care of Dr. Do, his shoulder pain had increased and the MRI displayed a full tear where there had been only a partial tear before. The accident of November 14, 2008, resulted in a right shoulder injury. Medical treatment was provided, claimant reached MMI and was returned to work with respondent. At some point, claimant's condition appears to have worsened. He was no longer able to perform his job with respondent and the medical examinations displayed a significant injury in his shoulder. Additionally, his neck complaints progressed from non-existent, to being very prominent. These new findings do not appear to be a direct and natural result of the November 14, 2008, accident. Instead they appear to be new, although unexplained. Whether they came from physical therapy is not proven from this record. Whether they came from claimant's continued employment with respondent was not alleged as no series of traumatic accidents was claimed here.

The Board finds claimant suffered an accidental injury which arose out of and in the course of his employment with respondent on November 14, 2008, to his right shoulder. Claimant has failed in his burden of proving any damage to his neck arose out of that accident. The Award of the ALJ is modified accordingly.

K.S.A. 44-510e defines functional impairment as;

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

⁴ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁵

The Board finds claimant suffered a 15 percent functional impairment to his right upper extremity at the level of the shoulder pursuant to the opinion of Dr. Zafuta, the authorized treating physician. This finding renders moot the issue regarding the offset for claimant's social security retirement.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified and claimant's award is limited to a 15 percent permanent partial impairment of function to his right shoulder. The social security offset will not apply as claimant is entitled to the full functional impairment award before an offset can be applied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 31, 2013, is modified to award claimant a 15 percent permanent partial impairment of function to the right shoulder. Additional award for claimant's alleged neck injuries is denied. This renders moot any decision regarding respondent's request for an offset pursuant to K.S.A. 2008 Supp. 44-501(h).

Claimant is entitled to 17.17 weeks of temporary total disability compensation at the rate of \$362.68, totaling \$6,227.22, followed by 31.17 weeks permanent partial functional disability at the weekly rate of \$362.68, totaling \$11,304.74, for a total award of \$17,531.96, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.

⁵ K.S.A. 44-510e(a).

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Troy A. Unruh, Attorney for Self-Insured Respondent
tunruh@wntlaw.com

Brad E. Avery, Administrative Law Judge